tion, they sought indirectly, by prosecuting and fining the complainant and its employees for failure to comply with the act, to nullify the benefit of the injunction and to imprison an employee for acting in conformity with it. He was, therefore, "in custody for an act done . . . in pursuance . . . of an order, process, or decree" of a federal judge, and the court properly dismissed him on a writ of *habeas corpus*. *Ex parte Wood*, 155 Fed. 190 (Circ. Ct., W. D. N. C.).

That this decision should be criticized adversely is not because the federal court lacked the authority to issue the writ, but because many federal courts regard the granting of the writ as a matter of discretion.[7] By attempting to interpret the intention of Congress,[8] but without express legislative restriction,[9] they have limited the granting of the writ, leaving the petitioner whose action has arisen in a state court to pursue his writ of error to the highest court of the state and thence, if unsuccessful, to the Supreme Court of the United States.[10] It is sometimes said that comity demands this rule.[11] But if comity means anything, it means the courtesy of equals. That courts are not foreign offices, however, and that the jurisdiction of a state is subordinate to that of the United States, even where concurrent, seem equally indisputable.[12] The explanation of the rule is rather that the usual occasion for denying the writ is when the petitioner, prosecuted under the criminal law of a state, claims to be held in violation of the Constitution of the United States; and that the indiscriminate issuing of the writ in such cases would seriously embarrass the administration of the criminal law of the states.[8] However necessary the rule may be,[13] the petitioner's right seems reduced, in the court's discretion, to a possible privilege. But the Supreme Court does not sufficiently justify this discretion, though it makes exceptions to the rule in urgent cases, awarding the writ "forthwith to the party entitled to it."[14] It is unnecessary, however, to bring the principal case within these exceptions. The rule and the exceptions should be confined to cases where parties are held in custody in violation of the Constitution. A party's rights and liberty are not ordinarily prejudiced when the state court is allowed to pass on the constitutionality of a statute under which he is indicted; but it is otherwise when he is held in custody for an act done in pursuance of a law of the United States, or for an act done in obedience of an order of a federal court. The federal court should then have no discretion in issuing the writ of *habeas corpus*, for the petitioner, as in the principal case, has an absolute right to have his case heard and disposed of in the court whose sovereign he served and whose decrees he obeyed.[15]

THE DELEGATION OF LEGISLATIVE POWER. — It is commonly held that although the legislature may not confer legislative power upon other persons or bodies, administrative powers and duties may be delegated. The ten-

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[7] *Ex parte* Royall, 117 U. S. 241.
[8] See *Ex parte* Royall, *supra*, 251.
[9] *Cf.* U. S. Rev. Stat. §§ 751, 755.
[10] Reid *v.* Jones, 187 U. S. 153.
[11] See *In re* Neagle, 39 Fed. 833, 845.
[12] See *Ex parte* Siebold, 100 U. S. 371, 392.
[13] See 6 Rep. Am. Bar Ass'n, 243; 25 Am. L. Rev. 149.
[14] See *Ex parte* Royall, *supra*, 250; *cf.* U. S. Rev. Stat. § 755; *In re* Fitton, 45 Fed 471, 474.
[15] See *In re* Neagle, 39 Fed. 833, 844.

dency of the courts has been to characterize the power brought in question as either legislative or administrative without careful analysis of its qualities. It seems, however, that the power, delegation of which is prohibited, is this; to lay down rules by which courts of law must determine the rights and obligations of others. If that is the only power which cannot be delegated, it follows that such delegation of power as that given to a commission to pass rules or by-laws by which it is to proceed, is not forbidden.[1] Similarly it would seem that power to choose the time or place or manner in which the board will execute an order of the legislature, may properly be delegated.[2] But power to issue orders that third persons shall make such changes in their property as the officer deems necessary, failure to obey which shall be punishable as a misdemeanor,[3] or a discretion to give or withhold the license of the state to perform certain acts,[4] is power to create a new rule of law by which the rights and obligations of third persons are determined. This view is justified by a recent decision of the Supreme Court of Minnesota which held that a statute which permitted a commission in its discretion to authorize increases in the capital stock of railroad corporations and to prescribe the manner in which such increase should be made, delegates legislative power and therefore is void. *State* v. *Great Northern Ry. Co.*, 100 Minn. 445.

The unfortunate limitations which a rule of non-delegability of such power imposes upon the exercise of governmental functions compels an examination of the principles upon which the doctrine rests. In its form as an American constitutional "maxim" the theory probably received its first full acceptance in the "referendum cases" of the fifth and sixth decades of the last century.[5] The principle of those cases was that ours is a representative government and the legislatures cannot be permitted to shift their responsibility by a change of the governmental form to the purely democratic through the device of a submission of measures to a popular vote.[6] The effect of these particular decisions has been evaded by the doctrines of conditional legislation and of local self-government,[7] but the statement that legislative power is not delegable has been constantly repeated by courts and text-writers. The reason of those decisions, however, cannot apply to a delegation of such powers to individuals or commissions. The suggestion that the legislature is an agent whose powers are non-delegable seems only a modest form of begging the question by the use of an unwarranted analogy.[8] It is to be noticed that none of our constitutions appear to forbid, expressly, the delegation of legislative power, except to the co-ordinate executive and judicial departments. In the absence of such prohibition it would seem that the ordinary rule of construction of state

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[1] Hildreth *v.* Crawford, 65 Ia. 339, 343.

[2] State *v.* Bryan, 50 Fla. 293. But *cf.* State *v.* Budge, 105 N. W. 724 (N. D.).

[3] Schaezlein *v.* Cabaniss, 135 Cal. 466. But see Union Bridge Co. *v.* United States, 204 U. S. 364.

[4] Noel *v.* People, 187 Ill. 587; Harmon *v.* State, 66 Oh. St. 249. *Cf.* O'Neil *v.* Insurance Co., 166 Pa. St. 72; Fite *v.* State, 88 S. W. 941 (Tenn.). But *cf.* State *v.* Wagener, 77 Minn. 483.

[5] A clue to the turn taken by these cases is offered by an examination of the theory of the governmental compact. See Willoughby, The Nature of the State, 54 *et seq.*; Opinion of the Justices, 160 Mass. 586, 595; Cooley, Const. Lim., 7 ed., 163 n. 1.

[6] Parker *v.* Conn., 6 Pa. St. 507.

[7] See Cincinnati, etc., R. R. Co. *v.* Commissioners, 1 Oh. St. 77; State *v.* Cooley, 65 Minn. 406.

[8] But see McClain, Const. Law, 62.

constitutions — that what is not forbidden is granted — should be applied. The public policy of permitting such delegation is perhaps best shown by the many cases which have, in fact, allowed it under the guise of "powers merely administrative." When violations of the rules made by state boards of health[9] or park commissions[10] are held punishable as offenses against the state, when the orders of railroad commissions are given the effect of positive law,[11] when the authority of examining boards[12] and executive councils[13] to grant or refuse the license of the state to exercise certain professions or occupations is constantly upheld, it is futile to contend that our courts do not sustain delegations of legislative power. Nor is a discretion to fix a rule of law for a third person any the less a legislative power because the range of choice which the commission is authorized to exercise is limited by standards of fairness and reasonableness.[14] The serious difficulties in the path of full delegability of legislative power are the common constitutional provisions as to the manner in which laws shall be enacted.[15] However, as these provisions have never stood in the way of delegations of legislative power to municipal and other local governmental bodies, it is easily possible that they apply only to enactment of formal statutes by the general assemblies.[16]

WHEN REDRESS FOR A TORTIOUS ACT COMMITTED IN A FOREIGN JURISDICTION WILL BE REFUSED. — While the general rule is that redress for a tort may be had in any jurisdiction where the wrongdoer may be found, certain exceptions exist. If the enforcement of a foreign law, which determines the existence of the tort and the right to recover, would be contrary to public policy as interpreted in the jurisdiction of the forum, the court will decline to act. This is clearly justified if the foreign law is contrary to morality or natural justice, but many courts refuse redress on this ground unless the law of the forum is similar to the foreign law.[1] Courts taking this position fail to grasp the fundamental conception that the obligation sued on is not based on the domestic but on the foreign law.[2] Courts sometimes refuse a remedy for a right arising solely under a foreign statute, such as the right to recover for death by wrongful act, but the better view is that there is no public policy against enforcing such laws.[3] Of course, foreign penal laws will not be enforced, for these are in the nature of a punishment for a wrong to the sovereign, which will not be dealt with by another state. Another, but unsound exception is that there can be no recovery for torts involving foreign real estate.[4] It is said such torts are not transitory but

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[9] Blue *v.* Beach, 155 Ind. 121; Pierce *v.* Doolittle, 130 Ia. 333. *Contra*, State *v.* Burdge, 95 Wis. 390.

[10] Brodbine *v.* Revere, 182 Mass. 598.

[11] Georgia R. R. *v.* Smith, 70 Ga. 694; Matter of N. Y. Elevated R. R. Co., 70 N. Y. 327.

[12] *Ex parte* McManus, 90 Pac. 702 (Cal.).

[13] Brady *v.* Mattern, 125 Ia. 158. See State *v.* Hagood, 30 S. C. 519.

[14] But see *In re* Thompson, 36 Wash. 377; State *v.* Briggs, 45 Ore. 366.

[15] See Santo *v.* State, 2 Ia. 165, 204; People *v.* Election Commissioners, 221 Ill. 9.

[16] See Wentworth *v.* Racine County, 99 Wis. 26; Georgia R. R. *v.* Smith, *supra*.

[1] Ash *v.* Baltimore, etc., R. R Co., 72 Md. 144; The Halley, L. R. 2 P. C. 193.

[2] *Cf.* Machado *v.* Fontes, [1897] 2 Q. B. 231, allowing recovery for a foreign act which, though illegal, did not give rise to a civil liability in the foreign jurisdiction.

[3] Herrick *v.* Minn, etc., Co., 31 Minn. 11.

[4] Livingston *v.* Jefferson, 1 Brock. (U. S.) 203. *Contra*, Little *v.* Chicago, 65 Minn. 48.